

401 Water Quality Certification



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Overview

- Background
- What does 401 regulate?
- Applying for a WQC
- Reviewing a WQC
- 1-step removal/gravel excavation
- Violations

Clean Water Act and Section 401

- Goal of CWA – to restore and maintain the physical, chemical & biological integrity of nation's waters.
- CWA is the framework for making our waters “fishable and swimmable.”
- Section 401 is written very broadly with respect to states' ability to regulate activities and protect water quality.

Certification – CWA § 401(a)(1)

- Any applicant for a **Federal license or permit** to conduct any **activity** including the construction or operation of a facility, which may result in any **discharge** into **navigable waters**, shall obtain a **certification from the state** where the discharge originates stating that the discharge will comply with applicable CWA and state provisions.
- Any **federal license or permit** - includes 404 (dredge and fill), FERC (hydroelectric), Section 10 (navigable waters), and others.
- **Certification** – that the **activity** and subsequent operation will comply with state WQ standards: protect designated uses, meet criteria, and comply with antidegradation policy.

State Water Quality Standards

State's Water Quality Standards, 401 KAR 10:026, 401 KAR 10:029, 401 KAR 10:030, 401 KAR 10:031 , consist of:

- Existing and designated uses that must be protected and supported in a particular water body,
- The numeric and narrative criteria that support such uses, and
- An antidegradation policy necessary to maintain existing uses.





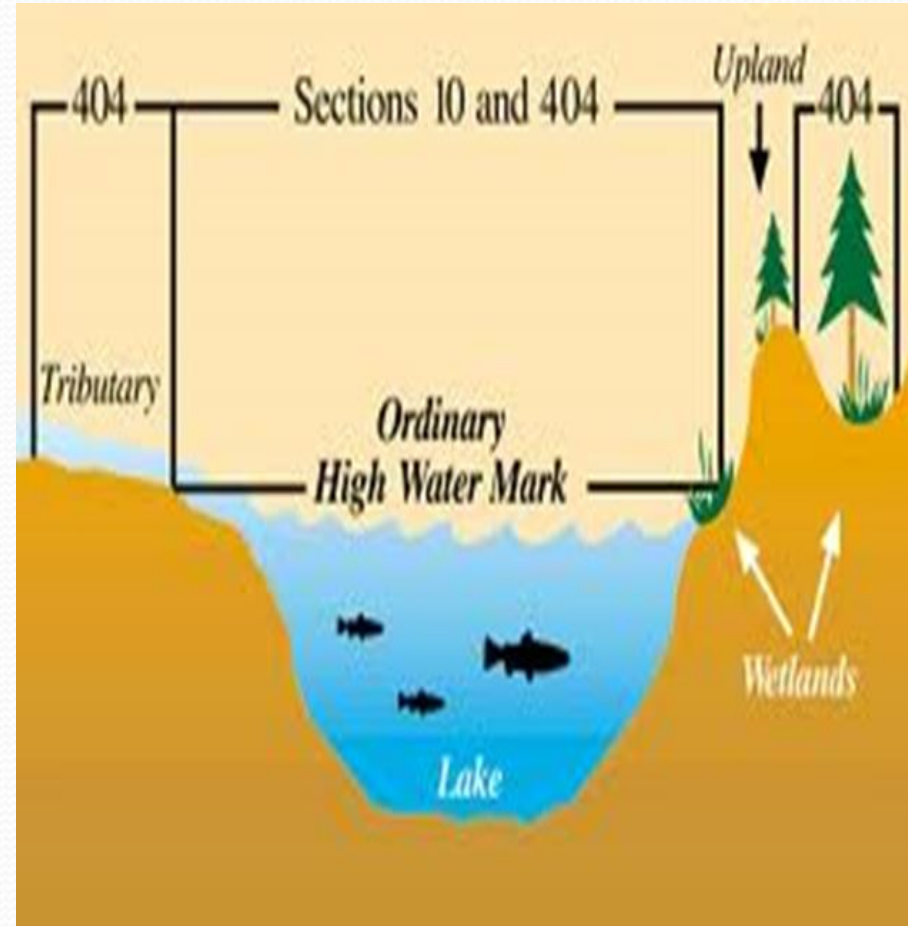
What does 401 regulate?

Regulations

- Specifically for 401:
 - 401 KAR 09:010
 - Public Notice
 - 401 KAR 9:020
 - WQC Fees and Timetable

What do we regulate?

- Section 401 Water Quality Certification is issued by the Kentucky Division of Water.
- Certifies U.S. Army Corps of Engineers Section 404 permits.
- State level of authorization for dredge or fill activities or operations below the Ordinary High Water Mark (OHWM) of a jurisdictional stream or wetland.



Regulates Dredge and Fill



401 Regulates Stream Crossings/Bridges



401 Regulates Culverts



401 Regulates bank stabilizations



401 Regulates FERC Projects



Other Common Projects

- Utility line projects
- Fill of wetlands
- Commercial/housing development
- Emergency watershed

USACE 404 Permits

- The Corps uses Nationwide Permits (NWP) and Individual Permits (IP) to regulate physical impacts to streams and wetlands
- DOW must “certify” NWPs every 5 years when the USACE reissues
 - Certify as written
 - Deny WQC for a NWP
 - Certify with conditions

NWP: Certify as Written

- If it qualifies for the USACE's 404 NWP, it automatically qualifies for our general certifications
- Examples:
 - NW 1: Aids to Navigation
 - NW 2: Structures in Artificial Canals
 - NW 6: Survey Activities
 - NW 11: Temporary Recreational Structures
 - NW 28: Modifications of Existing Marinas
 - NW 40: Agricultural Activities

NWP: Denied

- NW 16: Return Water from Upland Contained Disposal Areas
 - NW 17: Hydropower projects
 - NW 32: Completed Enforcement Actions
 - NW 38: Cleanup of Hazardous and Toxic Waste
 - NW 43: Stormwater Management Facilities
 - NW 44: Mining Activities
-
- This does not mean you won't get certified. Just that you have to get an individual certification instead.

NWP: Certified with Conditions

- The State of KY has the option to certify NWP with conditions.
- USACE NWP have limits, our conditions allow for more limitations.
- Examples:
 - Common limitations include:
 - Impacts no greater than ½ acre of wetland and 300lf of stream
 - Can not be within an OSRW
 - Can not be within a mitigation site

Other Conditions

- NW 13: Bank Stabilization
 - Can't use creek rock, grouted rip rap, unformed concrete/asphalt or asphalt pieces
- NW 29: Residential Developments
 - No detention/retention basins in streams/wetlands
- NW 36: Boat Ramps
 - Must be less than 20ft. in width
- Have the option to require individual certification on most NWP's with conditions

Applying for a WQC

Applying for a 401 WQC

- Fill out the Application for Permit to Construct Across or Along a Stream and/or Water Quality Certification
- Can be found on the DOW website
- Application will be reviewed for completeness
- If not complete, a Notice of Deficiency will be issued
- Project will be evaluated to determine the following:
 - Does it need a WQC?
 - Does it qualify for a NWP?
 - Is a Certification fee necessary?

Certification Decisions

GENERAL CERTIFICATION OF A NATIONWIDE PERMIT

- Suitable for smaller impacts (usually under 300 linear feet for streams; 0.5 acre for wetlands);
- Usually reviewed and issued within 30 days or less;
- Less extensive review
- Unless it is requested, general certifications letters are not issued

INDIVIDUAL CERTIFICATION

- Used for larger impacts;
- More extensive review;
- Detailed plans required;
- Projects reviewed within 30 days of receipt to determine if additional information is required.
- Requires public notification and may require an Individual Water Quality Certification Fee

401 Water Quality Certification Fees

1. Streams:

1. \$1,000 for an impact greater than 500 linear feet but less than 1,000 linear feet
2. \$2,500 for an impact of 1,000 linear feet to 5,000 linear feet
3. \$5,000 for an impact greater than 5,000 linear feet

2. Wetlands:

1. \$500 per acre of impacted wetland
2. This fee shall not exceed \$5000

Exempt from Certification Fee

- General WQC (NWP)
- Agricultural Operations
- Personal Residences

WQC Timetable

- Floodplains and WQC are together
 - Floodplains moves much faster than 401
- 30 days to determine if more info is needed
- Goal is to complete certification in 180 days
- Federal law gives us a year

WQC Timetable

- Timetable can “stop” for:
 - Waiting on applicant to respond to NOD
 - During the Public Notice
 - Waiting on certification fees
 - Time in which the certification, application, decision or related matter is the subject of litigation



Reviewing a WQC

Review of § 401 Application

- States can review:
 - long-term and indirect impacts
 - 401(d) requires state to assure compliance with **state surface water standards (401 KAR 10:031)** in light of permitted “activity,” including minimum stream flows requirement.
- Protect attainment of chemical criteria and the preservation of **designated uses (401 KAR 10:026)**.
 - Warm water aquatic habitat
 - Cold water aquatic habitat
 - Primary contact recreation
 - Secondary contact recreation
 - Domestic water supply
 - **Outstanding state resource water**

Technical Information

- Name and length of stream(s) impacted
- Acres of wetland(s) impacted
- Before photographs
- Proposed Work Plans and Specifications
 - How will it be constructed?
 - Materials
- Construction schedule
- Structure details
- Revegetation plan
 - Species list (existing and proposed)
- Sediment & Erosion Control plan
- Mitigation Plan (includes monitoring requirements)
- Success Criteria
- Permanent Protection
 - Conservation Easement
 - Deed Restriction

Types of Mitigation

- Mitigation Bank Credits
- In-lieu Fee Program Credits
- Permittee-responsible Mitigation (on-site and in-kind)
- Permittee-responsible Mitigation (watershed approach)
- Permittee-responsible Mitigation (off-site or out-of-kind)

Mitigation





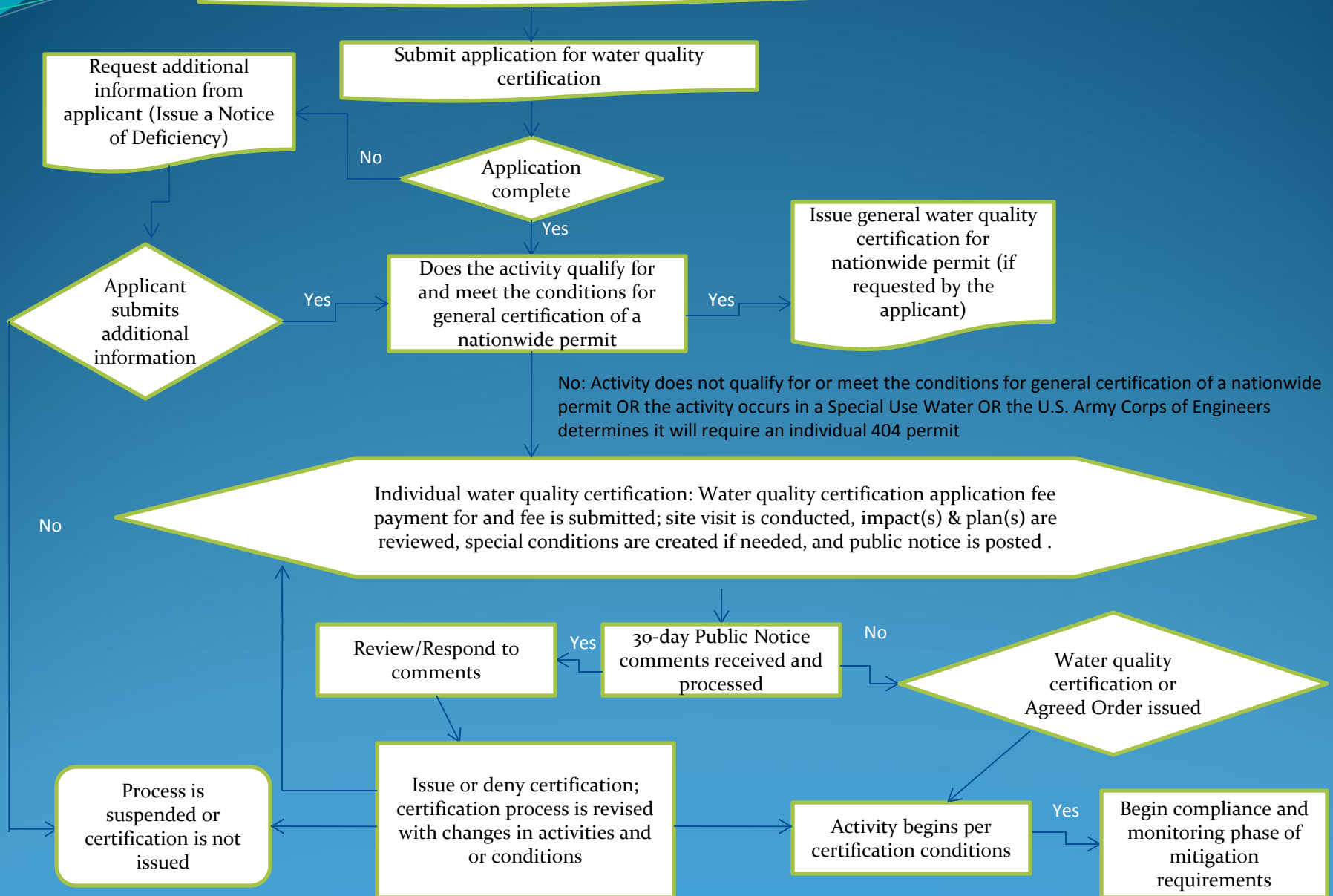
Stream Restoration

I have my certification! Now what?

- Read ALL of your certification
- Submittals
 - What do you need to be giving to the DOW?
- Conditions
 - What are your restrictions?
- Monitoring?
 - What do you need to submit as a report? When? How many years of monitoring?
- Renewal
 - When/how do you get a renewal?

Kentucky Division of Water 401 Water Quality Certification Process

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into jurisdictional waters





Extras!

One-Step Removal

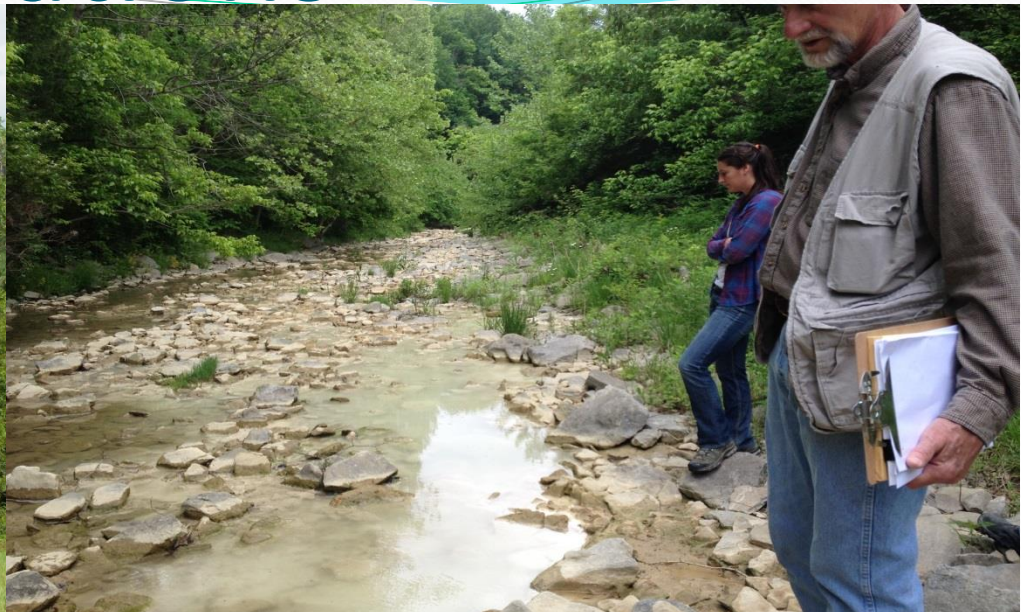
- Material removed must be placed outside of the floodplain
- Removal of vegetation should be limited to dead snags, loose debris and live vegetation that obstructs stream flow. Stumps and roots should be left alone.
- If equipment is needed, work from bank.
- Work quickly and during low flow or no flow cond.
- Not during fish spawning season (April 15-June 15)
- Impact the area the least amount possible and restore to original conditions once work is complete

Gravel Excavation

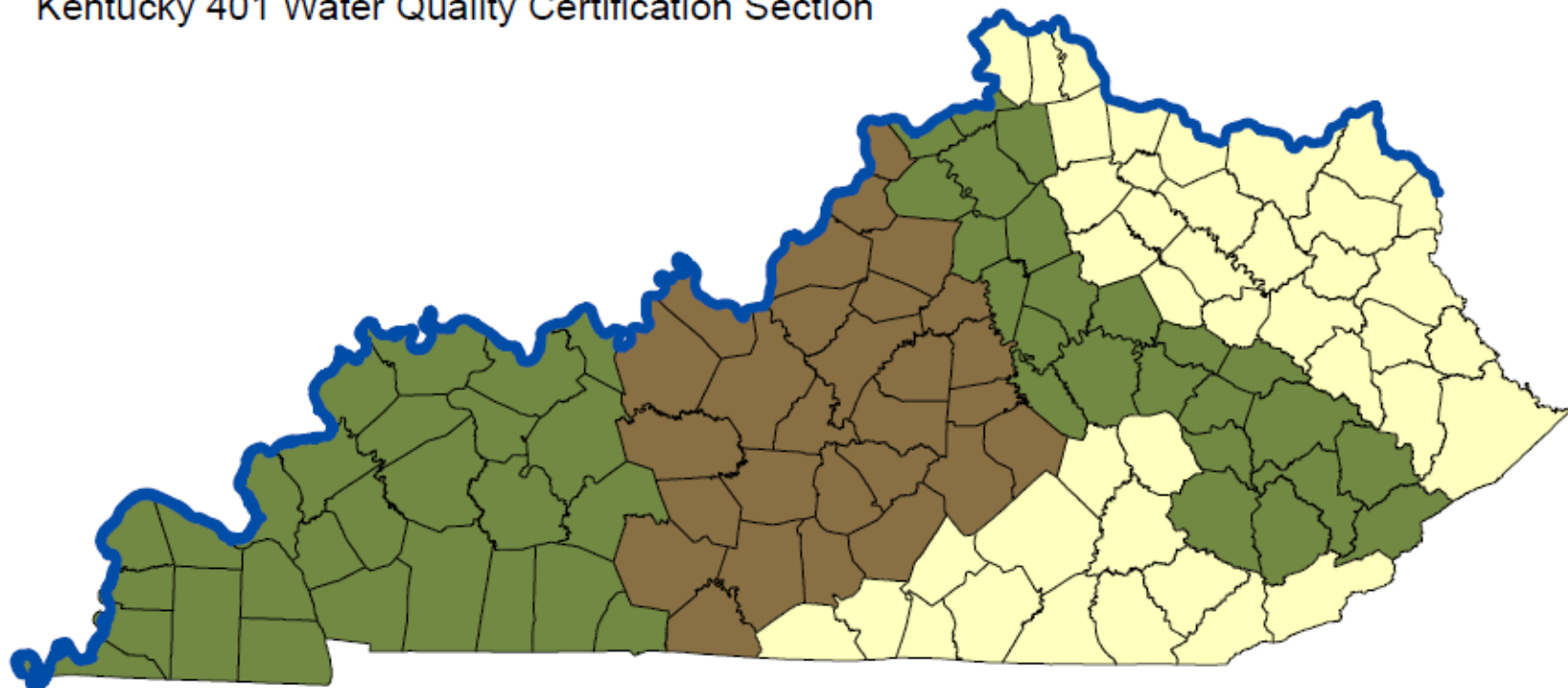
- Same as 1-step removal, but restricted to gravel bars
- Should only excavate to 12 inches above waterline
- A buffer of 10 feet should be maintained between the stream bank and the work area
- Frequency should be limited to the greatest extent possible (i.e once to once every year)
 - Keep in mind many streams are too small to accommodate gravel excavation in an environmentally sound manner



Violations



Kentucky 401 Water Quality Certification Section



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Questions?